1989

Patrick R. Donahue v. John C. Durfee; Delta Valley Foods, a Utah corporation; Larry Howell; Utah Power and Light Compnay, a Utah corporation; ABCO Construction Corp., a Utah corporation : Petition for Writ of Certiorari

Utah Supreme Court

W. Brent Wilcox, Edward B. Havas; Giauque and Williams, Wilcox and Bendinger; attorneys for appellant.
Robert B. Hansen; attorney for petitioner.

UTAH SUPREME COURT

BRIEF

IN THE UTAH SUPREME COURT

PATRICK R. DONAHUE, Plaintiff and Appellant, v. JOHN C. DURFEE; DELTA VALLEY FOODS, a Utah corporation; LARRY HOWELL; UTAH POWER & LIGHT COMPANY, a Utah corporation; ABCO Construction Corp., a Utah corporation, Defendants and Respondents.	Case No. 890454 Priority No. 13

PETITION FOR A WRIT OF CERTIORARI

FILED BY RESPONDENT HOWELL

Petition for Review of Decision of Court of Appeals (Case No. 880227-CA).

Honorable Gregory K. Orme, Russell W. Bench, and Regnal W. Garff, Judges of Court of Appeals.

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IN THE UTAH SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the defendant Howell (who contracted with "Mr. Rain Gutter", an independent contractor who employed Plaintiff) have any duty toward Plaintiff since the injury suffered was the result of an "open and obvious danger"?

2. Even if Utah law no longer recognizes the defense of the "open and obvious danger" under its comparative negligence doctrine, did the Larry Howell have any duty toward Plaintiff since he did not own the building in question, did not control it and was not subject to the safety regulations applicable only to the other defendants?

REPORTS OF OPINION

The subject decision has been published in 118 Utah Adv. Rep. 64 (CA, 9/28/89). A copy of the decision is No. 1 of the Appendix.

JURISDICTION

1. The decision sought to be reviewed was entered on September 28, 1989.

2. There has been no order respecting a rehearing and an order granting an extension of time for one day was entered herein on October 30, 1989.

3. No cross petition has been filed.

4. Jurisdiction of this court is invoked on the basis of Section 78-2-2(3,a) U.C.A. 1953.

CONTROLLING PROVISIONS OF EXPRESS LAW

There are no controlling provisions of express law.

STATEMENT OF CASE

This case involves personal injuries suffered by an employee of "Mr. Rain Gutter", an independent contractor who undertook to install a rain gutter on a building erected by a general contractor who came in contact with a high voltage wire which was too close to the building. Suit was filed against the utility company, the building contractor, the materials supplier (Howell), the building owner and operator. Plaintiff settled as to the utility company and the general contractor. The Court granted summary judgment motions as to the other defendants. The Court of Appeals reversed on the grounds that the existence of an "open and obvious danger" did not relieve the defendants of their duty to either elevate the power lines or give adequate warning of them to Plaintiff.

FACTS

The facts as they relate to the decision sought to be reviewed are that the only reference to them in that decision is as follows (from pages 8 and 9):

> "Lastly, we address the summary judgment in favor of Durfee and Howell. Donahue's claim against these two defendants is based on their roles in procuring and supervising the construction of the DVF warehouse, including allowing the active power line to remain so near the warehouse roof while Donahue worked. Apparently, the only basis for summary judgment in their favor was the open and obvious nature of the danger posed by the power line. As we held above, the

> mere obviousness of danger does not support summary judgment under these facts, and it must also be reversed as to both Durfee and Howell."

The facts as they relate to this petition are as follows:

1. Defendant Howell sells materials used in the erection of metal buildings (Deposition of Larry Howell ["Howell depo."] R 669, pp. 13-15).

2. Defendant Howell at purchaser's request will arrange for a licensed contractor to construct a building in accordance with purchaser's plans and specifications using the materials referred to in No. 1 above (Howell depo. R 669, p. 29).

3. Defendant Howell at purchaser's request will act as the agent for purchaser in obtaining the necessary building permits to erect the building referred to above (Howell depo. R 669, p. 28).

4. Defendant Howell sold to defendants Durfee and Delta Valley Foods the materials contained in the building in question and arranged for the construction contract between those defendants and ABCO Construction Corporation (Howell depo. R 669, pp. 53, 54).

5. Defendant Howell agreed with defendant Durfee to have certain guttering installed on the subject building, selected "Mr. Rain Gutter" from the Yellow Pages of the local telephone directory to do the work for him as an independent

contractor and paid the company for doing so (Howell depo. R 669, pp. 81, 82).

ARGUMENT

The decision which is the subject matter of this Petition is in conflict with this Court's decision in Ellertson v. Dansie, 576 P2d 867 (Utah 1978) which upheld the "open and obvious danger" doctrine struck down in the Court of Appeals. The decision itself said that Moore v. Burton Lumber & Hardware Co., 631 P2d 865 (Utah, 1981) "does cast doubt on the propriety of our conclusion here" (p. 7, footnote 3).

Said decision also so far departs from a correct understanding of and application of the facts (treating Howell as if he were an owner of property or one whose actions caused the injury) that is accepted and usual in the course of judicial proceeding as to call for an exercise of this Court's power of supervision.

The decision in question ties the "open and obvious dangers" doctrine to a contributory negligence system (see page 3) even though this Court's decision in Ellertson did not do so. The latter case simply held that where the danger is "just as observable to invitee as to the owner" there is "no duty to warn or to protect the invitee" (p. 868). Therefore, absent a duty, the first element of a negligence action (Williams v. Melby, 699 P2d 723, 726 (Utah 1985) is not present and hence there is no negligence with respect hereto in the first essential instance and hence nothing to compare.

If the trial court was correct in determining that as a matter of law the defendants (or any of them) are not liable, then its judgment should be affirmed even if the assigned reason ("open and obvious danger") is not the correct reason for the judgment being correct.

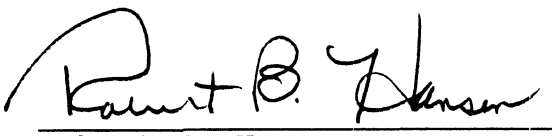
The Court of Appeals did not address any of the reasons Howell urged for the affirmance of the summary judgment in the District Court. The reasons advanced in his brief there and which he urges upon this Court appear as No. 2 in the Appendix.

In urging affirmance in said alternate grounds, petitioner is not appealing from an adverse ruling on those grounds, but respectfully points out that they have never been addressed as the Court of Appeals did not apply the applicable facts to the law. The Court of Appeals simply did not address those issues and should have done so.

CONCLUSION

For reasons set forth above petitioner respectfully submits that this petition should be granted as the case is very significant in settling Utah law with respect to "open and obvious dangers".

Respectfully submitted this 30th day of October, 1989.



Robert B. Hansen
Attorney for Respondent Howell

MAILING CERTIFICATE

I certify that I mailed four true and correct copies of the foregoing Petition for a Writ of Certiorari filed by Respondent Howell on this 31st day of October, 1989, to:

W. Brent Wilcox,
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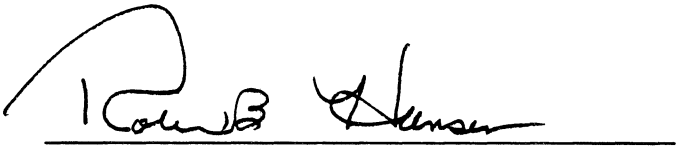

APPENDIX

1. Decision of Court of Appeals dated September 28, 1989.

2. Excepts from Petitioner's Brief of Respondent in Court of Appeals.

APPENDIX NO. 1

IN THE UTAH COURT OF APPEALS

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Patrick R. Donahue, Plaintiff and Appellant, v. John C. Durfee; Delta Valley Foods, a Utah corporation; Larry Howell; Utah Power & Light Company, a Utah corporation; ABCO Construction Corp., a Utah corporation, Defendants and Respondents.	)	OPINION (For Publication) Case No. 880227-CA

Third District, Salt Lake County
The Honorable Pat B. Brian

Attorneys: W. Brent Wilcox and Edward B. Havas, Salt Lake City, for Appellant
Darwin C. Hansen, Bountiful, for Respondents John C. Durfee and Delta Valley Foods
Robert B. Hansen, Salt Lake City, for Respondent Larry Howell

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Before Judges Bench, Garff, and Orme.

ORME, Judge:

Plaintiff Patrick Donahue appeals the district court's entry of summary judgment in favor of defendants Delta Valley Foods ("DVF"), John Durfee, and Larry Howell. Donahue filed this negligence action seeking to recover damages for injuries he suffered when he contacted an electrical power line while installing a rain gutter on DVF's warehouse. The district court concluded the power line constituted an open and obvious danger and, accordingly, DVF, Durfee, and Howell owed no duty to warn Donahue of the danger or otherwise protect him from it. We reverse and remand.

FACTS

Summary judgment is proper only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). "In reviewing a summary judgment, we analyze the facts and inferences in a light most favorable to the losing party." Copper State Leasing Co. v. Blacker Appliance & Furniture Co., 770 P.2d 88, 89 (Utah Ct. App. 1988). Accordingly, we set forth the facts as contended by Donahue.

John Durfee, DVF's general manager, hired Larry Howell, a steel building salesman, to organize the construction of a new warehouse for DVF. Howell's duties included procuring the necessary building materials and locating a suitable contractor. With Durfee's consent, Howell hired ABCO Construction Corp. to erect the warehouse.

By spring of 1982, the warehouse was mostly complete and Howell hired "Mr. Rain Gutter," Donahue's employer, to install a gutter to promote proper water drainage. On August 18, 1982, Donahue was assigned to assist with the DVF warehouse project. Donahue was required to work from atop the warehouse roof, where a 7200 volt high-tension power line operated by Utah Power and Light loomed approximately four to five feet overhead. Apparently, Donahue stood up during the gutter's installation and the top of his head struck the power line, causing a severe electrical shock and his resulting fall from the warehouse roof. Donahue was not warned about the powerline but saw it and perceived the potentially fatal danger which it posed.

In July of 1984, Donahue brought this negligence action against DVF, Durfee, Howell, ABCO, and Utah Power and Light.[1] DVF, Durfee, and Howell moved for summary judgment, contending they owed no duty to warn Donahue or otherwise protect him from the power line as it constituted an open and obvious danger. See, e.g., Steele v. Denver & Rio Grande W. R.R., 16 Utah 2d 127, 396 P.2d 751, 753-54 (1964). The district court agreed and entered summary judgment in favor of the defendants.

Donahue appeals, advancing several related arguments. However, the dispositive issue on appeal is whether the open and obvious danger rule is an absolute bar to Donahue's action under Utah's comparative negligence system. We hold that even

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1. Donahue entered into settlements with ABCO and Utah Power and Light, and they are not parties to this appeal.

assuming the power line was an open and obvious danger, Donahue is nonetheless entitled to have the finder of fact compare his negligence, if any, in encountering the power line with any negligence attributable to the defendants in creating or allowing such a dangerous condition to exist.

We first address this issue as it pertains to Donahue's claim against DVF based on its ownership of the warehouse.

TRADITIONAL APPROACH TO LANDOWNER LIABILITY

Historically, a landowner's duty of care owing to persons entering his or her land varied with the nature of the visit. See, e.g., Tjas v. Proctor, 591 P.2d 438, 441 (Utah 1979). But see Williams v. Melby, 699 P.2d 723, 726 (Utah 1985) (abandoning the traditional common law distinctions and instead imposing a duty of "reasonable care in all circumstances," at least toward the landowner's tenant). Accord English v. Kienke, 774 P.2d 1154, 1156 (Utah Ct. App. 1989); Gregory v. Fourthwest Invs., Ltd., 754 P.2d 89, 91 (Utah Ct. App. 1988). Under the traditional view a landowner has no duty to warn guests of "open and obvious dangers," regardless of the purpose of the visit. See, e.g., Ellertson v. Dansie, 576 P.2d 867, 868 (Utah 1978); Steele, 396 P.2d at 753-54. This doctrine is commonly known as the open and obvious danger rule, and it precludes an injured guest's recovery against the landowner for any injuries sustained through encountering an obvious risk. The justification for the rule appears to be that encountering an obvious risk is negligence as a matter of law and, at least under a contributory negligence system, a plaintiff who is even only slightly negligent is barred from recovery. An alternative justification is that while a landowner has a duty to warn guests of dangers on his or her property, the landowner's failure to do so is harmless where the danger is readily apparent.

The open and obvious danger rule has been sharply criticized. An often-cited basis for attack is that the rule establishes the landowner's duty of care according to what is known or should be known by the guest. See, e.g., Keller v. Holiday Inns, Inc., 105 Idaho 649, 671 P.2d 1112, 1117 (Ct. App. 1983), aff'd on other grounds, 107 Idaho 593, 691 P.2d 1208 (1984). These critics argue that a more logical approach treats the guest's knowledge of obvious danger as bearing only on the reasonableness of the guest's subsequent conduct, not as relieving the landowner of its duty of care. See, e.g., Keller, 671 P.2d at 1117 (the open and obvious danger rule does not differentiate between those facts relevant to the landowner's duty of care and those facts establishing a total

or partial defense to liability); Parker v. Highland Park, Inc., 565 S.W.2d 512, 521 (Tex. 1978) ("A plaintiff's knowledge, whether it is derived from a warning or from the facts, even if the facts display the danger openly and obviously, is a matter that bears upon [plaintiff's] own negligence; it should not affect the defendant's duty.").

Others have criticized the open and obvious danger rule for ignoring reality. As the Texas Supreme Court observed,

> [t]here are many instances in which a person of ordinary prudence may prudently take a risk about which he knows, or has been warned about, or that is open and obvious to him. . . . One's conduct after he is possessed of full knowledge, under the circumstances may be justified or deemed negligent depending on such things as the plaintiff's status, the nature of the structure, the urgency or lack of it for attempting to reach a destination, the availability of an alternative, one's familiarity or lack of it with the way, the degree and seriousness of the danger, the availability of aid from others, the nature and degree of darkness, the kind and extent of a warning, and the precautions taken under the circumstances . . . .

Parker, 565 S.W.2d at 520. See Keller, 671 P.2d at 1117. Courts subscribing to this view have either completely abandoned the open and obvious danger rule, as did Texas in Parker, or, at a minimum, refuse to apply the rule as an absolute bar in actions brought by plaintiffs who, like Donahue, entered the property in connection with their employment duties. See, e.g., Napoli v. Hellenic Lines, Ltd., 536 F.2d 505, 509 (2nd Cir. 1976) (a vessel owner must anticipate that a longshoreman may voluntarily encounter an obvious danger to avoid losing his job); Brown v. Martin Marietta Corp., 690 P.2d 889, 892 (Colo. Ct. App. 1984) (where an employee's duty renders an obvious danger unavoidable, injured employee is not barred as a matter of law from recovery against landowner); Shannon v. Howard S. Wright Constr. Co., 181 Mont. 269, 593 P.2d 438, 440-41 (1979) (where an employee must either forego employment or encounter danger, the obviousness of the danger will not completely bar the employee's recovery for any resulting injury).

A related approach is articulated in the Restatement (Second) of Torts (1965). Section 343A provides that a

landowner is not liable for a guest's injuries resulting from an open and obvious danger unless the landowner "should anticipate the harm despite such knowledge or obviousness." A few jurisdictions, apparently including Utah, have seen merit in this approach. See, e.g., Whitman v. W.T. Grant Co., 16 Utah 2d 81, 395 P.2d 918, 920 (1964) ("In order to justify holding that a jury question as to negligence exists, where injury has resulted from an observable hazard, it is essential that there be something which could be regarded as tending to distract the [injured person's] attention or to prevent him from seeing the danger . . . ."); Santos v. Scindia Steam Navigation Co., 598 F.2d 480 (9th Cir. 1979) (applying Restatement approach under Jones Act), aff'd, 451 U.S. 156 (1981); Scales v. St. Louis-San Francisco Ry. Co., 2 Kan. App. 2d 491, 582 P.2d 300, 306 (1978) (a landowner may be liable for injuries suffered by a worker encountering an obviously dangerous condition during periods of foreseeable distraction).

Thus, the open and obvious danger rule is not beyond reproach even within the contributory negligence system from which it arose.

COMPARATIVE NEGLIGENCE AND ASSUMPTION OF THE RISK

Utah has now abandoned its contributory negligence system. Utah Code Ann. § 78-27-38 (1987), entitled "Comparative Negligence," provides in part that "[t]he fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own." Utah Code Ann. § 78-27-37(2) defines "fault" as "any actionable breach of legal duty . . . including, but not limited to, negligence in all its degrees, contributory negligence, assumption of risk, ..." We hold that by enacting the above statutory provisions and establishing a comparative negligence system, the Utah Legislature has by necessary implication abolished the open and obvious danger rule as an absolute bar to an injured guest's recovery. Our conclusion is premised on two grounds.

First, the open and obvious danger rule is fundamentally incompatible with a comparative negligence scheme, which requires the finder of fact to allocate liability for an injury based on the relative responsibility of the parties involved. The adoption of a comparative negligence system amounts to an expression by the Legislature that the harsh and inflexible result of total victory or unconditional defeat compelled by the traditional contributory negligence system, including the open and obvious danger rule, is no longer acceptable. As most convincingly articulated by Judge Burnett for the Idaho Court of Appeals,

> [p]rior to the advent of comparative negligence, contributory negligence was an absolute bar to recovery. Thus, it made little difference whether a known or obvious condition excused a land possessor's duty to an invitee, or simply insulated the possessor from liability for any breach of such duty. But under the comparative negligence system, the difference is profound. If duty is not excused by a known or obvious danger, the injured invitee might recover, albeit in a diminished amount, if his negligence in encountering the risk is found to be less than the land possessor's negligence in allowing the dangerous condition or activity on his property. In contrast, if the invitee's voluntary encounter with a known or obvious danger were deemed to excuse the landowner's duty, then there would be no negligence to compare--and, therefore, no recovery. The effect would be to resurrect contributory negligence as an absolute bar to recovery in cases involving a land possessor's liability to invitees.

Keller, 671 P.2d at 1118-19. See also O'Donnell v. City of Casper, 696 P.2d 1278, 1281-82 (Wyo. 1985). While the Idaho Supreme Court did not immediately embrace Judge Burnett's entire analysis, see Keller v. Holiday Inns, Inc., 107 Idaho 593, 691 P.2d 1208, 1210-11 (1984) (limiting the basis for court of appeals holding), the court ultimately adopted that view and abandoned the open and obvious danger rule altogether, citing its incompatibility with Idaho's comparative negligence system. See Harrison v. Taylor, 115 Idaho 588, 768 P.2d 1321, 1325 (1989). In abandoning the traditional rule, the court noted that "[w]e recognize the role stare decisis plays in the judicial process. But we are not hesitant to reverse ourselves when a doctrine . . . has proven over time to be unjust or unwise." Id. at 1328. We are likewise convinced that the open and obvious danger rule is incompatible with Utah's comparative negligence system and join Idaho and a number of other states in announcing its abandonment.[2] See, e.g., Cox v. J.C.

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2. The middle ground taken by the Idaho Supreme Court in Keller, namely that of recognizing an exception for injured employees rather than rejecting outright the open and obvious danger doctrine, is not without attraction as a more cautious

Penney Co., 741 S.W.2d 28 (Mo. 1987) (en banc); Woolston v. Wells, 297 Or. 548, 687 P.2d 144 (1984); Parker, 565 S.W.2d at 517; O'Donnell, 696 P.2d at 1284.

Our second point of analysis is premised upon the fact that the assumption of risk doctrine has been expressly abandoned in Utah as a complete bar to recovery due to its incompatibility with our comparative negligence system. See Utah Code Ann. § 78-27-37(2) (1987). See also Moore v. Burton Lumber & Hardware Co., 631 P.2d 865, 870 (Utah 1981);[3] Jacobsen Constr. Co. v. Structo-Lite Eng'g, Inc., 619 P.2d 306, 309 (Utah 1980). Accord Deats v. Commercial Sec. Bank, 746 P.2d 1191, 1193-94 (Utah Ct. App. 1987). It would defy rationality to maintain the open and obvious danger rule as a complete bar to recovery where the essentially indistinguishable assumption of risk doctrine no longer compels such a result. See, e.g., Harrison, 768 P.2d at 1325 (open and obvious danger rule is a corollary to the assumption of risk doctrine and should likewise be abandoned); Parker, 565 S.W.2d at 518 (assumption of risk doctrine is inseparable from the

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(footnote 2 continued)
and conservative approach to the law's development. However, there is no defensible basis for making such fine distinctions in view of our conclusion that the open and obvious danger rule, at least as a total bar to liability, has been legislatively washed away with the enactment in this state of a comparative negligence scheme. And as discussed in the text, the Idaho court reached this very conclusion in Harrison only five years after its decision in Keller.

3. In Moore, 631 P.2d at 868, the Utah Supreme Court also held the defendant landowner was entitled to a jury instruction that he has no duty to warn a business invitee of an obvious danger, but the failure to give such an instruction under the particular facts was held to be harmless error. This result does cast doubt on the propriety of our conclusion here. While our Supreme Court recognized in Moore that the assumption of risk doctrine has been abandoned as a complete bar to recovery under sections 78-27-37 and -38, it failed to consider the effect of those provisions on the open and obvious danger rule, most likely because that point was not argued by the parties. 631 P.2d at 870. We believe that had the parties in Moore analyzed the open and obvious danger rule in this light, the Court would have held that there are no significant differences between it and the assumption of risk doctrine, abandoning both under our comparative negligence system.

open and obvious danger rule). See also Utah Code Ann. § 78-27-37(2) (1987) (defining "fault" for purposes of the comparative negligence scheme as including "assumption of risk" and "negligence in all its degrees").

Similarly, the Utah Supreme Court has interpreted section 78-27-37(2) to abolish the last clear chance doctrine as a complete bar to recovery.

> It is widely recognized that such doctrines as assumption of risk, last clear chance, and discovered peril resemble the old contributory negligence doctrine in that they are "all or nothing" doctrines in terms of recovery by the plaintiff . . . .
>
> [T]here seem to be no good reasons to retain [the last clear chance] doctrine which was originally devised because of another doctrine, i.e., contributory negligence, which the state of Utah has statutorily abolished as an absolute bar to recovery.

Dixon v. Stewart, 658 P.2d 591, 598 (Utah 1982) (emphasis added). We likewise find no good reasons to retain the open and obvious danger rule as an absolute bar to recovery. The summary judgment against Donahue and in favor of DVF must accordingly be reversed.[4]

JUDGMENT AGAINST OTHER DEFENDANTS

Lastly, we address the summary judgment in favor of Durfee and Howell. Donahue's claim against these two defendants is based on their roles in procuring and supervising the

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4. Our decision in this case will no doubt narrow somewhat the range of cases involving landowner liability in which summary judgment will be appropriate. However, summary judgment will still be available, even though the landowner will be unable to take refuge behind the open and obvious danger doctrine, in situations where the landowner establishes undisputed facts showing he was not negligent as a matter of law. Such situations include plaintiffs who are solely responsible for creating the dangerous condition on defendant's land. E.g., English v. Kienke, 774 P.2d 1154, 1157 (Utah Ct. App. 1989).

construction of the DVF warehouse, including allowing the active power line to remain so near the warehouse roof while Donahue worked. Apparently, the only basis for summary judgment in their favor was the open and obvious nature of the danger posed by the power line. As we held above, the mere obviousness of danger does not support summary judgment under these facts, and it must also be reversed as to both Durfee and Howell.

CONCLUSION

We reverse the summary judgment and remand this matter for trial or such other proceedings as may be appropriate consistent with this opinion. At trial, the finder of fact must compare the reasonableness of Donahue's conduct under all the circumstances in encountering the power line with the reasonableness of DVF's, Durfee's, and Howell's conduct in creating and allowing the potentially deadly power line to remain so near the warehouse roof, in an activated state, while work was being done on the roof. If any damages are warranted under this analysis, they must be awarded consistent with Utah Code Ann. § 78-27-38 (1987), as discussed above. The parties will bear their own costs of this appeal.

Gregory K. Orme, Judge

WE CONCUR:

Russell W. Bench, Judge

Regnal W. Garff, Judge

880227-CA

APPENDIX NO. 2

APPENDIX NO. 2

ARGUMENT

A. DEFENDANT HOWELL HAD NO DUTY OF CARE TOWARD PLAINTIFF

In order for any defendant to be liable in a negligence case the defendant must owe a duty to the plaintiff, 57 Am Jur 2d 378, 379 (Negligence, Sec. 33). Did the defendant Howell owe a duty to the plaintiff?

Plaintiff's first statement on this point under Argument "A" is the "Defendants breached their duty of care to plaintiff when they constructed a metal building too close to an existing energized high-tension electric wire, which resulted in the creation of an unreasonably dangerous working environment." (p.8) The fact is the defendant Howell did not build the subject building at all (his only involvement was to assist the owner in arranging for others to build the building).

The second statement on this point is in the next sentence where it says "Defendant's actions" violated a cited regulation. The defendant Howell was not involved in the "actions referred to (building the building too close for safety) so could not have violated said regulation. In addition the regulation expressly confers the duty on "the employer." Since defendant Howell was not the employer of the plaintiff even under the broad definition set forth on page 9 to include "every

person, firm and private corporation who have workmen employed at the construction site" (since defendant employed no one who was at the construction site, the cited regulation did not create any duty on this defendant).

The fourth and final basis asserted by plaintiff as an "alternative" basis for a duty of care toward plaintiff is that of a "business invitee." After citing two Utah cases (Glenn v. Gibbons & Reed Co., 265 P.2d 1019, Utah 1954 and Williams v. Melby, 699 P.2d 723, Utah 1985) which did not involve liability of a non property owner such as defendant Howell is in this case, plaintiff cites Prosser on the duties "upon owners and occupiers of land." Since defendant Howell was neither an owner or occupier of the land in question there is no basis for imposing any duty on him based on the principles of a "business invitee."

B. DEFENDANT HOWELL HAD NO AFFIRMATIVE DUTY TO WARN PLAINTIFF BASED ON EMPLOYMENT RELATIONSHIP OR OTHERWISE.

Contrary to plaintiff's assertion on page 5, defendant Howell did not hire the plaintiff to do the guttering work in question. He was hired to do that by his employer Eugene Strickland (Deposition of Patrick Donahue, pages 136, 137).

The only other basis suggested in plaintiff's brief for an affirmative duty to warn plaintiff was defendant Howell's observing the power lines in question about three months prior to the accident (page 12). No legal precedent to sustain liability on such a basis has been cited and the defendant submits none

exists (See Section 41 of Negligence in 57 Am Jur 2d 389 captioned "Moral or humanitarian considerations; duty to aid or protect others" where it states:

> As a general rule, the law imposed no duty on one person actively to assist in the preservation of the person or property of another from injury, even though the means by which harm can be averted are in his possession. The law does not undertake to make men render active service to their neighbors at all times because a good or brave man would do so.

If such knowledge alone is a predicate for liability, Earl Dickman, Douglas Stout and Darrell Martin who also saw those lines some three weeks prior to the accident (and long after defendant Howell saw them over a month before) should also have been sued individually and they were not.

C. ANY NEGLIGENCE ON PART OF DEFENDANT HOWELL WAS SUPERSEDED BY SUBSEQUENT NEGLIGENCE ON THE PART OF THIRD PARTIES SO AS NOT TO BE A PROXIMATE CAUSE OF INJURIES.

Defendant Howell acquired knowledge of the danger which later caused the tragedy in question on May 19, 1981 (page 12 of Plaintiff's Brief). Over a month later two officials of Utah Power & Light Company discussed the particular danger with an employee of the other defendants (pages 5, 6 of Plaintiff's Brief). Certainly those officials were in the best position of anyone to have caused the subject lines to be elevated and the danger completely removed. An independent subsequent act of negligence is generally a superseding cause which precludes the

initial negligence from being a proximate cause (Corpus Juris Secundum expresses the law as follows in Section 28 of Torts (p. 943):

> There, in the sequence of events between the original default and the final results, an entirely independent unforeseen cause intervenes sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate, and the other as the remote, cause.

Defendant Howell directs the Court's attention to the following parts of Plaintiff's Brief to consider in connection with the arguments for liability therein set forth:

1. Plaintiff states in argument "A" that "DEFENDANTS... CONSTRUCTED AND MAINTAINED A BUILDING...."

It is clear from the facts that defendant Howell did not construct (ABCO did) or maintain the subject building (Delta Foods did). At most it can be said that he assisted the defendant owner in doing so. Since Argument "A" is obviously based on facts that are erroneous, the conclusion is likewise faulty.

2. The plaintiff in lumping defendant Howell into "defendants" implies that he comes within the broad definition of "employer" so as to be subject to the regulation on safety cited on page 8. No proof exists in the record, however, that this defendant ever had any "workmen employed at a construction site." To contend that plaintiff had been employed by this defendant is to confuse a purchaser of the services of an independent

contractor with one who purchases the services of workers as an employer. To extend employers' duties to consumers would render a vast portion of our population liable for acts of businesses they have no power to control.

3. The implication of the quotation on page 11 is that the defendant Howell had the duty "incumbent upon owners and occupiers of land." Nothing exists in the record to impose such duties on this defendant as he had no ownership interest in or right of possession over the subject building.

4. Under Argument "B" plaintiff cites the Brigham case where the injured party is a ten year old boy. That fact certainly ought to disqualify it as persuasive regarding an adult worker with respect to "open and obvious dangers."

5. The deposition quotation of plaintiff on page 18 obviously conflicts with his quotation on the next page where he says "I'm always careful around power lines" but even if the former is determined to be correct (that he can't distinguish between the types of lines) that is more reason, rather then less, why he should stay entirely clear of any lines since the former proved he was aware that both kinds exist while the later makes it clear he knew power lines were dangerous.

6. Much is made on pages 18 and 19 that the warning given by defendant Durfee was general rather than specific. It should be noted, however, that this warning was given to an expert, to wit plaintiff's employer, not to plaintiff. To

presume that the expert in turn did not make the warning to plaintiff specific is not justifiable. As noted in 5 above, however, plaintiff was aware of the danger of power lines independent of whatever plaintiff's employer said to him and thus a specific warning would not have created an awareness where none existed before.

CONCLUSIONS

1. Defendant Howell had no duty, affirmative or otherwise, upon which liability could be predicted.

2. Any negligence of defendant Howell was not the cause of plaintiff's injuries because of intervening negligence on part of third parties.